

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKETS NO. 2020-264-E and 2020-265-E

In the Matter of:)	
)	
Duke Energy Carolinas, LLC's)	
Establishment of Solar Choice)	
Metering Tariffs Pursuant to S.C.)	
Code Ann. Section 58-40-20 (See)	RESPONSE TO OBJECTION TO
Docket No. 2019-170-E))	PUBLIC WITNESS TESTIMONY
)	
Duke Energy Progress, LLC's)	
Establishment of Solar Choice)	
Metering Tariffs Pursuant to S.C.)	
Code Ann. Section 58-40-20 (See)	
Docket No. 2019-169-E))	

The South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Vote Solar, North Carolina Sustainable Energy Association, and Solar Energy Industries Association jointly respond to the Office of Regulatory Staff's ("ORS") objection to former Representative Mandy Powers Norrell's testimony at the public hearing held in the above-referenced docket on April 21, 2021. Nearly one week after providing comments at a public hearing, ORS argues that Ms. Norrell's former service as a South Carolina Statehouse Representative from 2013 to 2019 during Act 62's enactment requires that her comments be struck from the record. ORS Objection to Public Witness Testimony (Apr. 26, 2021) ("ORS Objection"). ORS's objection should be rejected.

First, ORS's objection is based on the faulty premise that the Public Service Commission's acceptance of comments from the public are governed by the exact same

rules that apply to the conduct of a trial in courts of law. ORS assumes that Ms. Powers Norrell's comments at a public hearing before the Commission should be considered equivalent as witness testimony in a trial before a judge or jury. By the same token, ORS does not consider the important differences between providing comments at a public hearing, more akin to the Commission's administrative agency functions, and appearing as a witness at a merits hearing, when the Commission exercises a quasi-judicial function. Ms. Powers Norrell did not appear as a witness at the merits hearing on behalf of any party to this docket and her comments should not be held to the same standard as expert or fact witness testimony at such a hearing.

The difference in forum and type of proceeding make this circumstance distinguishable from the testimony at issue in the sole case cited by ORS in support of its objection and motion to strike. *See* ORS Objection at 2 (citing *Kennedy v. S.C. Ret. Sys.*, 549 S.E.2d 243, 250 (S.C. 2001)). Though the Commission has quasi-judicial functions, *see Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 708 S.E.2d 755, 760 (S.C. 2011), it is not operating as a court of law when it provides an open forum for public comment (whether in written or oral form). Public commentary from interested citizens who are not fact or expert witnesses would be inadmissible before a trial court. In contrast, the Commission frequently allows for public comments, consistent with its administrative duties. In this instance, the General Assembly required "notice and opportunity for public comment and public hearing" before the Commission adopts Solar Choice tariffs. S.C. Code Ann. § 58-40-20(F)(1). We are not aware of any statute that directs a trial court to provide opportunity for "public comment" before ruling on a contested issue. In contrast, the Commission provides instructions to the public for how

to complete a letter of protest so that non-parties have an avenue for providing their objections or opinions on matters that are before the Commission. *See* “Instructions and Frequently Asked Questions for Completing a Letter of Protest.”¹ ORS claims that “[i]t is clear the South Carolina Supreme Court has ruled that the Commission cannot consider” Ms. Powers Norrell’s public comments. ORS Objection at 2. But ORS has provided no support for the notion that rules governing admissibility of evidence in a trial apply to the Commission’s conduct of a public hearing.

Moreover, it would not make sense to apply strict rules of evidence or judicial rules of admissibility at a public hearing. When an administrative agency provides opportunity for public comment, it does not require that those individuals follow strict rules of evidence. For example, there was plenty of hearsay evidence in the comments offered at the recent public hearings on proposed Solar Choice tariffs (as when customers reported on what a solar contractor told them before installing their solar panels). Oftentimes, that hearsay evidence was solicited by questions from the Commission or other parties. The ORS did not object once to any of those instances of hearsay testimony that would have been inadmissible in a trial court. This is not surprising. At a public hearing, there is no need to monitor testimony as would be the case for a lawsuit being considered by a jury. Instead, the public comments are presented to the Commissioners, “a jury of experts,” who are capable of eliciting and fairly evaluating the public’s input. *Hilton Head Plantation Utilities v. Public Service Commission of South Carolina*, 441 S.E. 2d 321, 323 (S.C. 1994). Lastly, while not determinative, ORS’s selective concern

¹Found at the following web address:
<https://psc.sc.gov/sites/default/files/Documents/Letter%20of%20Protest/Letter%20of%20Protest%20Instructions%202019.pdf>

with which rules of evidentiary admissibility should apply to the conduct of the public hearing is striking. It suggests that ORS is concerned less with policing the strict rules of admissible evidence than with the substance of Ms. Powers Norrell's comments to the Commission.

Alternatively, if public hearings were to be bound by the strict rules of court, ORS did not make a contemporaneous objection, waiving its right to oppose Ms. Powers Norrell's testimony. It is well-settled that "[t]he failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 144 (S.C. 2010) (quoting *Cogdill v. Watson*, 347 S.E.2d 126, 130 (S.C. Ct. App. 1986)); *see also State v. Lynn*, 284 S.E.2d 786, 789 (S.C. 1981) (stating that failure to make a proper contemporaneous objection to the admission of evidence "cannot be later bootstrapped" and waives any objection to the evidence); *State v. Wilkins*, 425 S.E.2d 68, 73 (S.C. Ct. App. 1992) (holding that failure to make a contemporaneous objection "lost [defendant] his right to complain later on"). Failure to contemporaneously object is forgiven only in extreme situations, where a "vicious, inflammatory argument results in clear prejudice." *Dial v. Niggel Assocs., Inc.*, 509 S.E.2d 269, 274 (S.C. 1998) (emphasis in original). Such a narrow exception would not apply to this situation. ORS waived its right to object to Ms. Powers Norrell's testimony by waiting nearly a week to raise this issue to the Commission.

In sum, ORS's position is untenable. We respectfully request that the Commission deny ORS's request to strike Ms. Powers Norrell's comments at the public hearing from the record.

/s/ Kate Lee Mixson
SC Bar No. 104478
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, SC 29403
Telephone: (843) 720-5270
Fax: (843) 720-5240
*Counsel for South Carolina Coastal
Conservation League, Southern Alliance for
Clean Energy, and Upstate Forever*

/s/ Bess J. DuRant
Counsel
Sowell & DuRant, LLC
1325 Park Street, Suite 100
Columbia, SC 29201
Counsel for Vote Solar

/s/ Peter H. Ledford
General Counsel and Director of Policy
North Carolina Sustainable Energy
Association
4800 Six Forks Road, Suite 300
Raleigh, NC 27609
*Counsel for North Carolina Sustainable
Energy Association*

/s/ Jeffrey W. Kuykendall
Attorney at Law
127 King St., Suite 208
Charleston, SC 29401
Counsel Solar Energy Industries Association

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2020-264-E
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In the Matter of:)	
)	
Duke Energy Carolinas, LLC's)	
Establishment of Solar Choice)	
Metering Tariffs Pursuant to S.C.)	
Code Ann. Section 58-40-20)	CERTIFICATE OF SERVICE
)	
Duke Energy Progress, LLC's)	
Establishment of Solar Choice)	
Metering Tariffs Pursuant to S.C.)	
Code Ann. Section 58-40-20)	
)	

I certify that the following persons have been served with one (1) copy of the Response to Objection to Public Witness Testimony on behalf of the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, Vote Solar, the Solar Energy Industries Association, and the North Carolina Sustainable Energy Association by electronic mail and/or U.S. First Class Mail at the addresses set forth below:

Andrew M. Bateman, Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
abateman@ors.sc.gov

Benjamin P. Mustian, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
bmustian@ors.sc.gov

Carri Grube Lybarker, Counsel
S.C. Department of Consumer Affairs
Post Office Box 5757
Columbia, SC 29250
clybarker@scconsumer.gov

Heather Shirley Smith, Deputy General
Counsel
Duke Energy Carolinas, LLC
40 W. Broad Street, Suite 690
Greenville, SC 29601
heather.smith@duke-energy.com

J. Ashley Cooper, Counsel
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
ashleycooper@parkerpoe.com

Jeffrey M. Nelson, Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
jnelson@ors.sc.gov

Jeffrey W. Kuykendall, Counsel
127 King St., Suite 208
Charleston, SC 29401
jwkuykendall@jwklegal.com

Jenny R. Pittman, Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
jpittman@ors.sc.gov

Marion William Middleton III, Counsel
Parker Poe Adams & Bernstein, LLP
110 East Court Street
Suite 200
Greenville, SC 29601
willmiddleton@parkerpoe.com

Peter H. Ledford, General Counsel and
Director of Policy
North Carolina Sustainable Energy
Association
4800 Six Forks Road, Suite 300
Raleigh, NC 27609
peter@energync.org

Bess J. DuRant, Counsel
Sowell & DuRant, LLC
1325 Park Street, Suite 100
Columbia, SC 29201
bdurant@sowelldurant.com

Robert P. Mangum, Counsel
Turner, Padget, Graham & Laney, P.A.
Post Office Box 1495
Augusta, GA 30903
rmangum@turnerpadget.com

R. Taylor Speer, Counsel
Turner, Padget, Graham & Laney, P.A.
Post Office Box 1509, Greenville SC
29602
200 Broad Street, Suite 250
Greenville, SC 29601
tspeer@turnerpadget.com

Rebecca J. Dulin, Counsel
Duke Energy Carolinas, LLC
1201 Main Street, Suite 1180
Columbia, SC 29201
Rebecca.Dulin@duke-energy.com

Roger P. Hall*, Assistant Consumer
Advocate
South Carolina Department of Consumer
Affairs
***For Notice Purposes**
Post Office Box 5757
Columbia, SC 29250
rhall@seconsumer.gov

/s/ Kate L. Mixson
April 29, 2021